

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Application by)	
Qwest Communications International, Inc.)	
for Authorization to Provide)	WC Docket No. 02-148
In-Region, InterLATA Services)	
Colorado, Idaho, Iowa, Nebraska, and North)	
Dakota)	
_____)	

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TABLE OF CONTENTS

I.	QWEST’S SECRET DEALS VIOLATE THE CHECKLIST.....	5
	A. Qwest’s Secret Deals Violated the Checklist at the Time It Filed for Section 271 Authority.....	5
	B. Qwest Likely Still Has Important Secret Deals.....	10
II.	QWEST’S SECRET DEALS PRECLUDE ANY FINDING THAT ITS OSS IS READY.....	15
	CONCLUSION.....	22

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In the Matter of)	
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Qwest Communications International, Inc.)	
)	WC Docket No. 02-148
Consolidated Application for Authority to Provide)	
In-Region, InterLATA Services in Colorado, Idaho,)	
Iowa, Nebraska, and North Dakota)	
_____)	

**COMMENTS OF WORLDCOM, INC. ON THE APPLICATION BY QWEST
COMMUNICATIONS INTERNATIONAL, INC. TO PROVIDE IN-REGION,
INTERLATA SERVICES IN COLORADO, IDAHO, IOWA,
NEBRASKA, AND NORTH DAKOTA**

WorldCom hereby files comments in the above-referenced docket in response to the Commission's request for comment on Qwest's letter on August 20, 2002 notifying the Commission that it would file with state commissions certain of its negotiated agreements with CLECs.¹

The Commission should reject Qwest's pending section 271 applications on the basis of Qwest's secret deals because: (1) those deals contained discriminatory provisions that were in place when Qwest filed its two multi-state 271 applications; (2) discriminatory provisions likely remain in place today; and (3) the secret deals prevented the states or the third party tester from obtaining an accurate assessment of Qwest's OSS.

Before a Qwest section 271 application is approved, the Commission should make certain that all interconnection agreements have been revealed by Qwest, filed with and approved by the state commissions, and made available to CLECs for pick-and-choose purposes. In addition, the

¹ See Comments Requested in Connection with Qwest's Section 271 Application for Colorado, Idaho, Iowa, Nebraska, and North Dakota, Public Notice, WC Docket No. 02-148, Aug. 21, 2002.

Commission should encourage state commissions to reconsider OSS issues and if they do not, should conduct its own evaluation of OSS issues without the ordinary deference paid to state evaluations. The secret deals Qwest entered precluded these commissions from evaluating the most important evidence then available that Qwest's OSS is broken—the commercial experience of Qwest's two largest wholesale customers, Eschelon and McLeod.

WorldCom has expressed its concerns with Qwest's secret deals in comments filed in Qwest's two pending section 271 proceedings. Our concerns centered mostly on the impact of the secret deals on the OSS test results. Those concerns have only become more pronounced. It is now clear that the CLEC with by far the most long term experience with Qwest's OSS for UNE-P, Eschelon, was precluded by a secret deal not only from discussing with state commissions the problems it was experiencing, but also from discussing those concerns in change management and with a third party tester. McLeod too was precluded from discussing its problems. This substantially reduced the evidence available to KPMG or the states because few other CLECs had any measurable amount of commercial experience. Indeed, after thoroughly investigating the secret deal issue, the Arizona staff recently concluded that “an initial showing has been made that Qwest interfered with the 271 proceeding before the Commission and that the Commission's processes . . . were adversely impacted,” a conclusion that is equally true in the other states.²

² Supplemental Staff Report and Recommendation, *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, Aug. 14, 2002 (Arizona Staff Report), at 10 (Att. C hereto).

In addition, it has become more apparent in recent weeks that Qwest had not filed all of the secret deals containing discriminatory interconnection terms by the time it filed its section 271 applications with the Commission. An investigator in Minnesota recently concluded that Qwest entered an oral agreement with McLeod providing a 10% discount on all products ordered across the region with an elaborate scheme to mask that agreement through a different written agreement. That astounding agreement has not been filed.

In addition, Qwest has recently revealed and posted on its website additional secret deals that are still in effect. Given the recency of Qwest's posting of these agreements, WorldCom has not had time to examine all of them. But it is clear that at least some contain significant provisions that should have been filed pursuant to sections 251 and 252. And given Qwest's pattern of behavior, there are likely others that have not yet even been filed. The Commission must therefore reject Qwest's applications under its complete-when-filed rule. Promptly rejecting Qwest's application to fully investigate the potential impact of the secret deals is entirely reasonable. Qwest was fully aware of the potential impact of its secret deals on the section 271 process. Parties had raised the issue at the state-level and several states initiated investigations. But here we are on the 75th day of the 90-day process, and Qwest is still producing agreements that potentially should have been filed with the state commissions.

I. QWEST'S SECRET DEALS VIOLATE THE CHECKLIST

A. Qwest's Secret Deals Violated the Checklist at the Time It Filed for Section 271 Authority

The section 271 checklist prohibits discriminatory treatment, *see* checklist items (ii), (iii), (vii), (ix), (xii), yet Qwest engaged in just such discrimination. It is only now that Qwest has chosen to file with state commissions multiple interconnection agreements that it entered and that provide favorable terms for some CLECs. There is no doubt that Qwest was in violation of the checklist at the time that it filed both of its multi-state section 271 applications.

Many of the agreements that Qwest has now posted on its website contain discriminatory provisions. Covad's April 19, 2000 agreement, for example, included special performance guarantees. Qwest promised to provide 90% of Covad's Firm Order Confirmation dates within 48 hours of receipt of a completed service request for unbundled loop services and 90% of Covad's FOCs within 72 hours for DSL-capable, ISDN-capable and DS1-capable loops. Qwest also agreed to provide Covad with unbundled loop service that did not require the usual loop conditioning at least 90% of the time and agreed to reduce the incidence of failure on new Covad circuits to less than 10% within the first 30 days. The agreement also provided special options regarding service requests held for line conditioning. This agreement was available in Idaho, Iowa, Montana, Nebraska, Utah, Washington, and Wyoming.³

³ In its reply comments in the Qwest's second multi-state application, Qwest acknowledges that Iowa specifically found the Covad agreement should have been filed and made available for pick and choose. Qwest Reply Comments, *In the Matter of Application by Qwest to Provide In-Region InterLATA Services in the States of Montana, Utah, Washington, and Wyoming*, WC Docket No. 02-189, filed Aug. 26, 2002 (Qwest II Reply Comments) at 134. Qwest suggests that the Covad contracts contained targets but not binding commitments, but that is not how the requirements read. They state that: "US West will provide 90% of Covad's Firm Order Confirmation (FOC) dates within 48 hours"; "U.S. West will provide Covad with line sharing service . . . at least 90% of the time within the interval set forth in any line sharing agreement between Covad and U S West," and "U S West will reduce the incidence of failure on new Covad circuits to less than 10% failure within the list 30 calendar days." There is a "commitment to reach these service levels within 90 days." If the Covad agreement had been filed and CLECs had opted into it, the clear written terms would have provided performance guarantees. And even if these terms could have been read as targets, they clearly provided some protection for Covad or there would have been no point of including them in the agreement.

Covad's is not the only agreement to provide special performance guarantees. McLeod's Confidential Settlement Agreement dated May 1, 2000 also provides such guarantees. In particular, Qwest promises that when McLeod contacts Qwest regarding facility availability parity for resold Centrex services, Qwest will respond within five working days, and if there is a legitimate issue, Qwest "will undertake immediate action to correct the situation" and will reimburse McLeod for reasonable legal and administrative responses incurred in responding to the situation. This deal is available in all nine states for which Qwest currently is seeking section 271 authorization.

The agreements that Qwest has filed also contain provisions in which Qwest agrees to provide special help to some CLECs to ensure better performance. For example, the Eschelon Settlement Agreement, dated March 6, 2002, included a promise to make UNE-E available for a specific time period and created a joint Qwest/Eschelon team to coordinate the conversion from UNE-E to UNE-P. Qwest also promised to help move Eschelon from a manual to a mechanized process for billing UNE-P, including help in validating minutes of use.

Still other agreements included special pricing provisions. McLeod's Confidential Billing Settlement Agreement dated April 28, 2000 in all nine states for which Qwest seeks section 271 authority includes special prices for subscriber list information, and guarantees that the parties will not be billed for any true-ups if the state requires such true-ups in ordering final rates. Other agreements established special procedures for resolving and escalating disputes. McLeod's October 26, 2000 Confidential Agreement, for example, provides for quarterly meetings of executives at the vice president level or above to address unresolved business issues and disputes and establishes specific escalation procedures.⁴

⁴ Among the secret deals that Qwest posted on its website are deals that Qwest entered with WorldCom. WorldCom insisted during negotiations with Qwest that any changes in terms or conditions related to section

Qwest argues that there is a serious legal question as to whether its secret deals are interconnection agreements for purpose of section 252, and that this is not the type of issue that should be resolved in section 271 proceedings.⁵ And it may be that there is a serious question as to the applicability of the section 252 requirements to some of the agreements that Qwest has now posted on its website. Whatever the gray area with respect to the meaning of interconnection agreements, agreements including special performance guarantees, rates and special escalation provisions are clearly interconnection agreements that must be filed. But even if this were this not so, the section 271 checklist requires nondiscriminatory access to UNEs. So long as Qwest has secret deals providing favorable access to UNEs for some CLECs, it is not complying with the checklist requirement of non-discrimination regardless of whether it had an independent obligation to file the agreements under section 252.

Qwest suggests that this is a small compliance question, but the checklist requirements cannot be dismissed so easily. And the fact is that it is not a small question when Qwest is providing performance guarantees for some CLECs that are not available to others. It is not a small question when the new evidence of discriminatory contract provisions is assessed against past behavior in which Qwest offered a 10% price discount to Eschelon, for example, in part in exchange for Eschelon's agreement not to participate in section 271 proceedings.

251/252 requirements must be filed by the parties in state contract amendments, and has worked with Qwest in good faith to do so. Some of these amendments have been filed and approved by the states and others are still in progress. Regardless, WorldCom is happy to have these agreements reviewed by regulators to determine the filing requirements that should apply to them. It is important to note parenthetically that unlike some other agreements, these do not contain provisions prohibiting WorldCom from participating in section 271 proceedings.

⁵ Qwest II Reply Comments at 128-29.

Qwest also suggests a need for further investigation into the “facts” surrounding these agreements. But it is Qwest’s fault that it is too late to thoroughly examine such facts. At a minimum, these agreements are discriminatory interconnection agreements on their face and Qwest should have revealed them before it filed. As for the remaining agreements that WorldCom has not discussed here, WorldCom believes that in light of Qwest’s pattern of behavior in failing to file agreements that clearly fall within the scope of section 252, a pattern that will become more apparent in the remainder of our Comments, the Commission’s Enforcement Bureau should carefully examine these agreements to determine whether they should have been filed before approving a Qwest section 271 application.

Qwest’s recent decision to file previously secret agreements with state commissions and to make those agreements available for pick-and-choose does not alter the fact that many of these agreements were secret at the time that Qwest filed its two multi-state section 271 applications. The BOC must meet the checklist requirements at the time it files its application.⁶ The Commission adopted the complete-when-filed rule in order to allow all parties to comment on the relevant evidence without creation of a moving target and to allow the Commission adequate time to evaluate the evidence.⁷ But the parties have had very little time to evaluate the secret deals that Qwest just made public.

⁶ Michigan 271 Order ¶¶ 52-55.

⁷ *Id.*

Although the Commission waived the complete-when-filed rule during Rhode Island section 271 proceedings, the primary factor justifying that waiver is not present here. In Rhode Island, Verizon applied with UNE rates that were benchmarked to the then-existing New York rates. After New York reduced its UNE rates during the 90-day evaluation period, Verizon reduced the Rhode Island rates. It was central to the Commission’s waiver decision that the New York rate reduction that required a corresponding rate reduction in Rhode Island was not within Verizon’s control.⁸ Here, in contrast, Qwest was fully in control of the decision to file for section 271 authority while secret deals remained in place. Indeed, Qwest was well-aware that its secret deals were relevant to the section 271 process. Secret deals were an issue in state 271 proceedings, and it was obvious that the issue would be raised by the parties in the federal section 271 proceeding. Moreover, Qwest filed a petition for declaratory ruling with this Commission seeking clarification on which agreements need to be filed -- likely a tactical decision to defer the issue to a non-271 proceeding. Rather than rushing its section 271 applications to the Commission, Qwest should have ensured that this question had been resolved by either this Commission or the state commissions so that its section 271 applications could be complete-when-filed. Instead, Qwest filed, knowing full well that discriminatory agreements existed at the time. Because it subsequently became clear that additional actions were necessary “in order to demonstrate compliance with the requirements of section 271 . . .,” Qwest’s “application is premature and should be withdrawn.”⁹

B. Qwest Likely Still Has Important Secret Deals

⁸ Rhode Island 271 Order ¶¶ 9, 12-13.

⁹ Michigan 271 Order ¶ 55.

Qwest's application could not be approved even if evaluated based on the state of affairs that exists today. To begin with, even the deals that Qwest has now filed have not yet been approved by the state commissions and thus are not available to other CLECs to pick-and-choose with the guarantees provided by the Act. A mere offer by Qwest to make pick and choose available is insufficient. And state commission approval may not be immediate because states must first evaluate confidentiality concerns. Although there will always be some lag between filing of agreements and their approval, here it is Qwest's fault that so many agreements are pending before state commissions so near the date by which a decision on Qwest's first section 271 application must be made.

More important, Qwest likely has not even filed all of its secret deals with state commissions for approval. Qwest's August 20 *ex parte* did not promise to file all of its existing secret deals or all relevant deals that it enters in the future. In particular, Qwest has not agreed to file agreements that in its view do not relate to Section 251(b) or (c) and that relate to "settlements of past disputes."¹⁰ Qwest also has not agreed to file future settlement agreements it enters. But while not all settlements of past disputes are interconnection agreements, some clearly are. A special pricing deal or performance guarantee could almost always be categorized as a settlement of some dispute or other, for example. The Arizona Staff concluded that most of the unfiled interconnection agreements were labeled billing settlement agreements.¹¹ Indeed, many of the formerly secret deals that Qwest has now posted on its web site are termed "settlement agreements." What remains unclear is how many so-called settlement agreements Qwest has refrained from posting or how many future interconnection agreements it will keep secret based on its view that settlement agreements are exempted.

¹⁰ Letter from Melissa E. Newman, Qwest, to Marlene Dortch, FCC, WC Docket Nos. 02-148 and 02-189, filed Aug. 20, 2002, at 2.

Qwest's past conduct demonstrates a clear willingness to take significant steps to keep secret deals from becoming public. Qwest's decision to enter the secret deals in the first place despite the clear command of section 252 demonstrates a willingness to flout the rules. The steady release of evidence on additional secret deals in state proceedings and in Qwest filings with this Commission evidence a strong likelihood that all secret deals have not yet been discovered.

In Arizona, after investigation, the staff identified 25 agreements containing provisions related to interconnection that should have been filed but were not.¹² Surprisingly, however, nowhere near 25 agreements have been posted for any of the states on Qwest's web site – suggesting either that Arizona had a particularly high number of secret deals or that all deals have not yet been posted in the other states.

Even more revealing is the investigation that W. Clay Deanhardt conducted for the Minnesota Department of Commerce of the deal between Qwest and McLeod.¹³ Mr. Deanhardt determined that Qwest had agreed to provide McLeod a 10% volume discount on all purchases it made from Qwest everywhere in the Qwest region in large part in exchange for McLeod's agreement not to oppose Qwest's section 271 applications. Because Qwest did not want other CLECs to be able to opt into this very enticing discount provision, Qwest demanded that the agreement be oral, demonstrating the lengths to which Qwest would go to protect its secret deals.

¹¹ Arizona Staff Report at 2.

¹² See Arizona Staff Report.

¹³ Supplemental Testimony in the Minnesota Complaint Proceedings, MPUC Docket No. P-421/C-02-197, July 24, 2002.

McLeod was concerned, however, that an oral agreement would not offer it sufficient protection. So to guarantee execution of its oral agreement, Qwest came up with a scheme in which the parties entered a separate agreement whereby Qwest promised to buy a certain volume of goods from McLeod but would pay for the goods regardless of whether it actually received them. The payment was established in such a manner as to equate to the 10% discount that McLeod had been promised. This complex scheme to hide the 10% discount from other CLECs almost worked. Throughout Mr. Deanhardt's investigation, Qwest claimed that it had no oral agreement to provide a 10% discount to McLeod. It was only after Mr. Deanhardt reviewed extensive documents and interrogatories and attended depositions that he was able to conclude that such an agreement existed.

Qwest has not filed this agreement in other states in the region. Qwest's failure to file this agreement alone warrants rejection of its section 271 application. WorldCom realizes, of course, that there is a factual dispute over the existence of the volume discount with McLeod. Qwest still has not admitted that it has such an agreement,¹⁵ and it remains possible that the Minnesota Commission will find that this agreement did not exist. But, as of now, the record shows that the third-party who investigated this matter found that such an agreement did exist. At a minimum, given the pattern of Qwest's conduct, this justifies investigation of the alleged agreement by the Commission's Enforcement Bureau before Qwest receives section 271 authority. Failure to file a deal providing a 10% across the board discount would be highly discriminatory.

¹⁵ The findings of Mr. Deanhardt are consistent with what was found by the Arizona staff. The staff found that there was an oral agreement that McLeod would not oppose Qwest's 271 application, and that there was an oral agreement concerning product amounts to be purchased by Qwest under a written purchase agreement. *See Arizona Staff Report.*

Moreover, there likely are other oral agreements that Qwest has not filed. Like McLeod, Eschelon entered a secret deal with Qwest to refrain from testifying in section 271 proceedings throughout the Qwest region.¹⁶ In exchange for providing consulting services to Qwest, Eschelon received a 10% discount on all aggregated charges made by Eschelon until December 31, 2005.¹⁷ Eschelon also received a dedicated special service account team to identify and resolve service--related issues and to hold monthly meetings to review performance measurements.¹⁸ According to a letter from Eschelon to the Minnesota ALJ, Qwest first offered the 10% discount as part of an oral agreement. Qwest indicated that it wanted to ensure that other CLECs could not opt-in to this provision.¹⁹

Moreover, even after Qwest committed its deal with Eschelon to writing, Qwest did not file that agreement, further evidencing its willingness to refrain from disclosing deals containing core interconnection terms. While Eschelon has now repudiated that agreement, Qwest's tactics cast further doubt on Qwest's willingness to comprehensively disclose all secret deals and suggest that there may be other oral (or written) deals that have yet to be disclosed.

There is therefore no reason to trust Qwest's claim that it has now filed all interconnection agreements in the states for which it is applying for section 271. The state decisions not to reopen their section 271 dockets to consider the secret deals do not suggest to the contrary. It is this Commission's independent obligation to assess whether discriminatory treatment exists that precludes a finding of section 271 checklist compliance. Moreover, to a large extent, the state decisions rested on the fact that they had already closed their section 271 dockets and it was now up to the FCC or state enforcement investigations to reach a conclusion

¹⁶ November 15, 2000 Agreement Re: Escalation Procedures and Business Solutions from Minnesota record.

¹⁷ Amendment to Trade Secret Agreement from Nov. 15, 2000 from Minnesota record.

¹⁸ Qwest/Eschelon July 31 Implementation Plan from Minnesota record.

about secret deals. The states generally did not reach a conclusion as to whether there was ongoing discrimination that violated the checklist. *See* Nebraska Order at 1-2²⁰ (expressing “great[] concern” about possible secret deals and noting they would “taint the 271 process throughout the entire 14-state region” but noting that “inasmuch as this issue is presently before the FCC, the Nebraska Commission, at this time, denies AT&T’s motion to Reopen.”); North Dakota Transcript (including discussion by Commissioners noting issue was now before the FCC); Colorado decision (discussing ongoing investigation “that will run its own course separate and apart from the § 271 proceedings); Wyoming decision at 4 (noting separate investigation would resolve issue and FCC would decide legal standard for filing); Oregon decision at 10 (relying on decisions of other states and DOJ recommendation and noting that Oregon “lacks a unique perspective or interest in the analysis). Alternatively, they acted under the premise that Qwest already had filed its past secret deals. *See* Iowa Order at 9. The two states that have engaged in the most active investigation of Qwest’s secret deals, Arizona and Minnesota, have discovered numerous discriminatory deals that Qwest has not filed. They continue to consider the serious impact of Qwest’s discrimination.

Given Qwest’s history on this issue, the Commission should have the Enforcement Bureau investigate whether secret deals remain unfiled before authorizing Qwest to provide long distance service. At a minimum, it must wait for the conclusion of state investigations. At present, there is no basis to conclude that Qwest is providing non-discriminatory access to unbundled elements, as the checklist requires.

II. QWEST’S SECRET DEALS PRECLUDE ANY FINDING THAT ITS OSS IS READY

¹⁹ Letter from J. Jeffrey Oxley to Judge Lewis, MPUC Docket No. P-421 (May 15, 2002) at 2 n.2 (Att. A hereto).

²⁰ All of the cited decisions are attached to Qwest’s *ex parte* letter dated August 21. *See* Letter from R. Hance Haney, Qwest, to Marlene Dortch, FCC, WC Docket Nos. 02-149 and 02-189, dated Aug. 21, 2002.

Even aside from the issue of discriminatory treatment, the secret deals entered into by Qwest would warrant rejection of its application. Those deals eliminate any basis for concluding that Qwest's OSS is ready.

Unlike other BOCs that have applied for section 271 authority, Qwest has very limited commercial experience with its OSS particularly with respect to CLECs ordering UNEs to provide service to the mass market. Even in June, Qwest processed fewer than 6,500 orders for UNE-P over its EDI interface region wide. Neither WorldCom nor AT&T entered the Qwest region until recently (WorldCom entered in April) as a result of the sky-high UNE rates that remained in place until shortly before Qwest filed its first federal section 271 application. Thus, WorldCom has been unable to perform the role it performed in other regions where it had entered commercially prior to state section 271 proceedings and while the third party test was proceeding. In those regions, WorldCom was able to point out to the third party tester the problems WorldCom was experiencing commercially so that the tester could focus on those areas. WorldCom also was able to explain the OSS problems it was experiencing to state commissions during section 271 proceedings, and WorldCom was able to drive important changes through the change management process.

But in the Qwest region the key CLECs that could have fulfilled that role – Eschelon and McLeod -- were prevented from doing so by the secret deals that they had entered. Eschelon and McLeod are the two CLECs with the most and longest experience placing UNE-P orders in the Qwest region. They are two of Qwest's biggest wholesale customers. It is likely that they were the only carriers with any significant UNE-P experience at the time of the hearings in the states for which Qwest has applied. But they were precluded from testifying. As Eschelon has noted,

participants in state 271 proceedings “did not have the benefit of explanation by Eschelon, which had first-hand experience with the [OSS] problems.”²¹

As a result, the state commissions received a distorted view of Qwest’s OSS and checklist performance.²² As the Arizona staff stated after investigating the issue, “Staff believes that an initial showing has been made that Qwest interfered with the 271 proceeding before the Commission and that the Commission’s processes . . . were adversely impacted.”²³

There is little doubt that the testimony of Eschelon and McLeod could have proven critical. Despite the special OSS teams devoted by Qwest to Eschelon, Eschelon has detailed before this Commission a multitude of extremely serious OSS problems it is currently experiencing and that it was experiencing at the time of the state proceedings.²⁴ These issues include, for example, a huge error rate in the provisioning of features. They also include numerous problems associated with Qwest’s failure to adopt industry standard migrate-as-specified ordering process – the very issue on which WorldCom has been focused before this Commission. Although WorldCom did not know of this issue until after it entered the market in April, Eschelon had been complaining to Qwest about this issue for more than a year. But Eschelon was unable to bring it up during state proceedings as a result of its secret deal. Thus,

²¹ See Letter from J. Jeffrey Oxley, Eschelon, to Commissioners Spitzer and Irvin, Arizona Corporation Commission, July 10, 2002, at 1 (Arizona letter).

²² Whatever Qwest may say about its oral agreement to provide McLeod a volume discount, there is no doubt that McLeod entered an *oral* agreement not to oppose Qwest in state 271 proceedings. See “States Probe Qwest’s Secret Deals To Expand Long-Distance Service,” *Wall Street Journal*, p. A10 (April 20, 2002) (“The company also had a verbal agreement to not oppose Qwest’s entry into long-distance, McLeod officials told regulators, a contention that Qwest does not dispute.”)

²³ Arizona Staff Report at 10.

²⁴ See, e.g., Eschelon Comments, WC Docket No. 02-189, at p. 10, stating that as it has started placing UNE-P orders with Qwest again, conversions and migrations are still resulting in the same types of customer-affecting problems that occurred when Eschelon first tried to launch UNE-P in 2000. See also Eschelon Comments, WC Docket No. 02-189 at p. 14, stating that Qwest continues to deny access to the Remote Access Forwarding switch feature with UNE-P, even though Eschelon has been raising this issue for 1 ½ years.

state commissions did not address this issue in their section 271 proceedings.²⁵ Eschelon also has explained that Qwest prohibited Eschelon from participating in change management meetings, “pulled” Eschelon representatives from the meetings, and actually called Eschelon executives to complain that Eschelon should not be saying anything at change management meetings.²⁶

In addition, there may still be CLECs that are barred by existing agreements from participating in section 271 proceedings. Qwest has not indicated that it has made public all agreements containing provisions barring CLECs from participating in section 271 proceedings. Nor has Qwest indicated that it has released CLECs from their contractual obligation not to participate in section 271 proceedings. Thus, it may be that even this Commission is receiving a distorted view of Qwest’s OSS performance as a result of Qwest’s secret deals.

Qwest must relieve all CLECs of any continuing obligations not to participate in section 271 proceedings. Ideally, the Commission would refrain from granting any Qwest section 271 application until the states had considered any new evidence set forth by these CLECs. At a minimum, the Commission should itself take evidence from these CLECs. (This likely would require rejection of Qwest’s current applications and a requirement to re-file.) Moreover, because the states did not hear evidence from these previously barred CLECs, the Commission should consider that evidence anew, rather than deferring to state 271 assessments that were made without access to that evidence. That is also how the Commission should consider the

²⁵ See Eschelon Comments, WC Docket No. 02-189 at 12, stating that Eschelon raised this issue with Qwest in 2000. Eschelon also did not bring this issue up in change management, significantly delaying the time by which a new process will be implemented. Eschelon has indicated that Qwest significantly inhibited its participation in the change management process. See Letter from J. Jeffrey Oxley to Arizona Commissioners Spitzer and Irvin, July 10, 2002. (Att. B hereto).

²⁶ Arizona Letter at 2, 5-6.

extensive evidence Eschelon already has presented regarding critical defects in Qwest's OSS – evidence that Eschelon could not present to state commissions.

Qwest cannot rely on the third party test to show its OSS is acceptable. Commercial experience is always important, but is particularly important here. The quality of a test depends critically on input from CLECs that are in the market. But in the Qwest region, the key CLECs that were in the market – Eschelon and McLeod--had entered secret deals barring their participation in section 271 proceedings. Qwest apparently interpreted these agreements to preclude Eschelon and McLeod from discussing the problems they were experiencing with the testers. As Eschelon explained in its letter to the Arizona Commission, Qwest “asked Eschelon to reduce the number of communications to other CLECs and the testers (such as by not copying emails to other members of the CMP Re-design Team) and discuss performance issues off line rather than in meetings attended by others.”²⁷ Eschelon added that it “had to inquire of Qwest as to the boundaries of the limitations on Eschelon's participation, because it had become clear that Qwest interpreted the 271 limitation more broadly than Eschelon.”²⁸ Thus, Eschelon did not raise the issue of Qwest's failure to use industry standard migrate as specified with the tester, for example. The limits on Eschelon's interaction with the tester are by far the most important impact of the secret deals on the test.

Moreover, while Eschelon and McLeod likely were not free to detail to KPMG the problems they were experiencing, KPMG did rely on data from these CLECs for some parts of the third-party test. But despite the significant problems Eschelon was experiencing with some parts of its OSS, its experience was likely better in some respects than the typical CLEC given the special OSS teams devoted to it. McLeod may have had similar or even greater advantages,

²⁷ Arizona Letter at 6 (emphasis added).

but WorldCom does not know the full contents of McLeod's agreements. And Covad, whose data also was relied on by KPMG, had entered a secret deal providing it special performance guarantees unavailable to other CLECs. Thus, the test results based on data from these three CLECs, even if they show acceptable performance, do not show that Qwest will provide similar performance for other CLECs.

KPMG acknowledged as much in its May 7 report. KPMG stated that:

First, KPMG Consulting makes no assertion as to the accuracy or completeness of the information provided by the three CLECs. Second, KPMG Consulting makes no assertion as to whether or not the information received from the three CLECs is representative of the 'typical' CLEC experience, given the preferential treatment the three CLECs may have received from Qwest.

With respect to numerous test criteria related to Qwest's provisioning performance (Test criteria 14-1-9, 14-1-21, 14-1-25, and 14-1-27), KPMG stated that it had substantially relied on one or more of the three CLECs' representations, information or data as the primary data point used in drawing its conclusions for those criteria.²⁹ Indeed, in response to WorldCom questions, KPMG indicated that 231 of 235 orders it relied on to determine whether Qwest was performing at parity with respect to installation intervals came from the three CLECs. Moreover, KPMG stated more generally in response to WorldCom questions that "practically 100% of the resale/UNE-P observations came from one of the CLECs" with a secret deal.

KPMG ultimately concluded that it was not aware of any facts that called into question the integrity of the data it relied on. But KPMG did not even examine the secret deals before

²⁸ *Id.* at 6 n. 7.

²⁹ With respect to many other test criteria (12, 12.7, 14, 18, and 24.6), KPMG partially relied on data and information from one or more of these three CLECs. The criteria in Test 12 primarily concern performance with respect to loop qualification. Of particular concern to WorldCom, KPMG indicated in response to WorldCom questions that the vast majority of its observations with respect to line sharing came from one or more of the three secret deal CLECs, presumably Covad. Finally, with respect to Tests 18.7, 18.8, 23 and 24.5, KPMG relied to some degree on one or more of the three CLECs' data and information. The criteria in Test 18 concern Qwest's ability to respond to troubles.

reaching this conclusion. Thus, KPMG had no basis to determine whether the three CLECs whose data it used were receiving special treatment, which would make that data unreliable as a basis for assessing Qwest's performance for other CLECs. It bears repeating that KPMG itself acknowledged that it was not asserting Qwest's performance for these CLECs was typical.³⁰ But without that determination, there is no basis for concluding the test shows Qwest's performance was adequate.

Similarly, the conclusion of the ROC Executive Committee not to reopen the test does not show the test results were valid. The ROC Committee concluded that it would not reopen the test because in some states the 271 record was closed, KPMG had identified the sections of the report that depended on input from the relevant CLECs, and the issue will now be the subject of advocacy before the FCC. That is not a conclusion that the results of the test can be trusted but rather a conclusion that this Commission must determine the extent to which the test was distorted.

Ideally, KPMG would retest those areas for which it relied on data from secret deal CLECs that had guarantees of preferential treatment. KPMG also would retest those areas where the existence of commercial problems was not made known to KPMG because CLECs were precluded from sharing their commercial experience as a result of secret deals. But at a minimum, the Commission must scrutinize OSS evidence presented to it with the understanding that neither KPMG nor state commissions were provided a full picture of CLECs' experience. Again we underscore the key OSS deficiencies, long known to Eschelon, that are being presented to this Commission but have not been presented previously. WorldCom is experiencing significant commercial problems as a result of many of these deficiencies now that it has entered

³⁰ Qwest's claim in its Qwest II Reply Comments that the experience of these three CLECs was typical has not been audited by anyone. Moreover, Covad, presumably was the source of almost all DSL data. And Qwest's own data

the market. Qwest's section 271 applications must be rejected until Qwest fixes existing OSS problems and eliminates any serious question that all discriminatory provisions in interconnection agreements are now available for pick and choose.

CONCLUSION

For the reasons described above, Qwest's section 271 applications should be denied.

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